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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 202

HOWETH M. MILLS AND CRAWFORD MILLS, d/b/a MILLS DAIRY PRODUCTS COMPANY, A CO-PARTNERSHIP, BRICE G. TWILLEY, INDIVIDUALLY AND BRICE G. TWILLEY, d/b/a TWILLEY'S CITY DAIRY, AND NESBIT C. MURPHY, INDIVIDUALLY AND NESBIT C. MURPHY, d/b/a SHILOH DAIRY FARMS,

Petitioners,

v.

ORVILLE L. FREEMAN, SECRETARY OF AGRICULTURE, AND UNITED STATES OF AMERICA,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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The Daily Record Co., Baltimore 3, Md.

INDEX

TABLE OF CONTENTS

	PAGE
OPINIONS BELOW	2
JURISDICTION	2
QUESTIONS PRESENTED	2
CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS	3
STATEMENT OF THE CASE	4
REASONS FOR ALLOWANCE OF THE WRIT	6
CONCLUSION	22
APPENDIX:	
Opinion of the United States Court of Appeals, Fourth Circuit, March 11, 1963	1a
Decree, March 11, 1963	19a
Opinion of the United States Court of Appeals, Fourth Circuit, April 25, 1963	20a
Judgment, April 25, 1963	24a
Agricultural Marketing Agreement Act of 1937, as amended, 7 U.S.C. 601, *et seq.*	27a
Sections 1004(b) and 1006(c) of the Administrative Procedure Act of 1946, as amended, 5 U.S.C. 1004(b) and 1006(c)	40a
Rules of Practice Governing Proceedings in Petitions to Modify or to be Exempted From Marketing Orders, 25 F.R. 5911-5917, June 28, 1960; 7 C.F.R., Ch. IX	41a
Milk Marketing Order No. 127, effective January 1, 1960, 24 F.R. 11071, December 31, 1959	66a

CITATIONS

Cases

	PAGE
American Airlines v. Civil Aeronautics Board, 235 F. 2d 845 (C.A.D.C., 1956)	22
Baltimore & Ohio R. Co. v. United States, 264 U.S. 258 (1924)	9
Bowles v. Baer, 142 F. 2d 787 (C.A. 7, 1944)	10
Brotherhood of R.R. Trainmen v. Swan, 214 F. 2d 56 (C.A. 7, 1954)	13
Green Spring Dairy, Inc. v. Commissioner of Internal Revenue, 208 F. 2d 471 (C.A. 4, 1953)	11
Heitmeyer v. Federal Communications Commission, 95 F. 2d 91 (1937)	22
Joint Anti-Fascist Refugee Com. v. McGrath, 341 U.S. 123 (1951)	10
Marine Engineers Ben. Ass'n v. National Labor Rel. Bd., 202 F. 2d 546 (C.A. 3, 1953)	13
Miami Beach Federal Savings & Loan Ass'n v. Calander, 256 F. 2d 410 (C.A. 5, 1958)	11
Morgan v. United States, 298 U.S. 468 (1936)	10
Morgan v. United States, 304 U.S. 1 (1938)	10
National Labor Rel. Bd. v. Houston & North Tex. M.F.L., 193 F. 2d 394 (C.A. 5, 1951)	13
New York State Guernsey Breeders Co-op. v. Wickard, 141 F. 2d 805 (C.A. 2, 1944)	10
Philadelphia Co. v. Securities and Exchange Com'n, 175 F. 2d 808 (C.A.D.C., 1948)	10, 12
Philips Dodge Corp. v. National Labor Rel. Bd., 313 U.S. 177 (1941)	21
Pinkett v. United States, 105 F. Supp. 56 (D.C. Md.)	13
Shields v. Utah Idaho Central R. Co., 305 U.S. 177 (1938)	10
Skinner & Eddy Corp. v. United States, 249 U.S. 557 (1919)	9
Stark v. Wickard, 321 U.S. 288 (1944)	10

PAGE

United States v. Baltimore & O. R. Co., 293 U.S. 454 (1935) 22

United States v. Chicago M. St. P. & P. R. Co., 294 U.S. 499 (1935) 22

United States v. Rock Royal Co-op., 306 U.S. 533 (1937) 18, 19

United States v. Ruzicka, 329 U.S. 287 (1946) 10

United States v. Shaughnessy, 337 U.S. 807 (1949) 12

United States v. Storer Broadcasting Co., 351 U.S. 192 (1956) 10

Wong Yang Sung v. McGrath, 339 U.S. 33 (1950) 12

Statutes

28 U.S.C. 1254 2

Agricultural Marketing Agreement Act of 1937, as amended, 7 U.S.C. 601, *et seq.* 2, 3, 4

Section 608(a)(6) 4

Section 608c(15)(A) 2, 3, 6, 7, 9, 11, 12, 21, 22

Section 608c(18) 3, 20

Section 608c(15)(B) 6

Administrative Procedure Act, 5 U.S.C. 101, *et seq.*

Sections 1004(b), 1006(c) 3, 7, 12, 13

Miscellaneous

Rules of Practice Governing Proceedings on Petitions To Modify or To Be Exempted From Marketing Orders, 25 F.R. 5911-5917, June 28, 1960; 7 C.F.R., Ch. IX 2, 4, 7, 11

Revised Recommended Decision Regulating the Handling of Milk in the Washington, D.C. Marketing Area, 24 F.R. 767 14

IN THE

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OCTOBER TERM, 1962

No. ------

HOWETH M. MILLS AND CRAWFORD MILLS, d/b/a MILLS DAIRY PRODUCTS COMPANY, A CO-PARTNERSHIP, BRICE G. TWILLEY, INDIVIDUALLY AND BRICE G. TWILLEY, d/b/a TWILLEY'S CITY DAIRY, AND NESBIT C. MURPHY, INDIVIDUALLY AND NESBIT C. MURPHY, d/b/a SHILOH DAIRY FARMS,

Petitioners,

v.

ORVILLE L. FREEMAN, SECRETARY OF AGRICULTURE, AND UNITED STATES OF AMERICA,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioners, Howeth M. Mills and Crawford Mills, as individuals, and Howeth M. Mills and Crawford Mills, d/b/a Mills Dairy Products Company; Brice G. Twilley, individually, and Brice G. Twilley d/b/a Twilley's City Dairy; and Nesbit C. Murphy, individually, and Nesbit C. Murphy d/b/a Shiloh Dairy Farms, pray that a writ

of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered March 11, 1963.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 315 F. 2d 828 and is printed herein (App. 1a).

The opinions of the District Court are reported at 185 F. Supp. 709 (D. Md.), (Gov't. App. 96); 187 F. Supp. 314 (D. Md.), (Gov't. App. 107) and 206 F. Supp. 239 (D. Md.), (Gov't. App. 205).[1]

JURISDICTION

The judgment of the Court of Appeals was entered March 11, 1963. Jurisdiction arises under 28 U.S.C. 1254. No petition for rehearing was filed by Petitioners herein.[2]

QUESTIONS PRESENTED

1. Whether petitioners were denied due process of law by the refusal of the Secretary of Agriculture to permit them to introduce any evidence at a hearing conducted pursuant to Section 608c(15)(A) of the Agricultural Marketing Agreement Act of 1937, as amended, 7 U.S.C. 601, *et seq.*

2. Whether the Secretary of Agriculture violated his own regulations (25 F.R. 5911-5917, June 28, 1960; 7 C.F.R.,

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[1] Reference is made to the Government's Appendix in the Court of Appeals as "Gov't. App.". The Appendix of Petitioners herein in the Court of Appeals is referred to as "Mills App.". The appendix hereto is referred to as "App.".

[2] A petition for a stay was filed by petitioners herein and denied by the Court of Appeals on April 25, 1963. A petition for rehearing was filed by oth[illegible] Appellees in the consolidated appeals and was also denied on April 25, 1963. The opinion and order of the Court denying the petition for rehearing and the motion for a stay, not yet officially reported, are printed in App. 20a, 24a.

Ch. IX), issued pursuant to Section 608c(15)(A) of the Agricultural Marketing Agreement Act of 1937, as amended, in refusing petitioners the opportunity to introduce any evidence at a hearing conducted pursuant to Section 608c(15)(A) of the Agricultural Marketing Agreement Act of 1937, as amended, 7 U.S.C. 601, *et seq.*

3. Whether the the Secretary of Agriculture violated Sections 1004 and 1006 of the Administrative Procedure Act, 5 U.S.C. 1001, *et seq.*, in denying petitioners the opportunity to submit evidence at a hearing conducted pursuant to Section 608c(15)(A) of the Agricultural Marketing Agreement Act of 1937, as amended, 7 U.S.C. 601, *et seq.*

4. Whether the Secretary of Agriculture, by including the rural and non-contiguous Eastern Shore area of Maryland along with the Baltimore Metropolitan area in Milk Marketing Order No. 127 (24 F.R. 11071) exceeded his authorized statutory power.

5. Whether the Secretary of Agriculture, before issuing Milk Marketing Order No. 127 (now No. 16) (24 F.R. 11071), pursuant to Section 608c(18) of the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. 601 *et seq.*, was required by that Section to make basic findings of fact.

CONSTITUTIONAL PROVISION, STATUTES AND REGULATIONS

1. Constitution of the United States, Amendment V.

2. Agricultural Marketing Agreement Act of 1937, as amended, 7 U.S.C. 601 *et seq.* (App. 27a).

3. Sections 1004(b) and 1006(c) of the Administrative Procedure Act of 1946, as amended, 5 U.S.C. 1004(b) and 1006(c) (App. 40a).

4. Rules of Practice Governing Proceedings in Petitions to Modify or to be Exempted From Marketing Orders. 25 F.R. 5911-5917, June 28, 1960; 7 C.F.R., Ch. IX (App. 41a).

5. Milk Marketing Order No. 127, effective January 1, 1960, 24 F.R. 11071, December 31, 1959 (App. 66a).

STATEMENT OF THE CASE

Pursuant to the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. 601, *et seq.*, the Secretary of Agriculture issued Milk Marketing Order No. 127 (App. 66a) effective January 1, 1960.[3] Order No. 127 regulated the marketing of milk in Baltimore City, counties contiguous thereto and certain rural and essentially non-contiguous counties located on the "Eastern Shore" of the Chesapeake Bay.[4] The Order was entitled as included in its scope of coverage the "Upper Chesapeake Bay Marketing Area." The Order provided, *inter alia*, for the fixing of minimum prices for milk received from dairy farmers by milk companies engaged in the business of selling fluid milk in the marketing area.[5]

Petitioners are milk companies whose plants are located in Dorchester County on the Eastern Shore. Petitioners acquire their milk almost exclusively from local dairy

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[3] 24 F.R. 11071, December 31, 1959.

[4] The Eastern Shore counties included in the order are Caroline, Cecil, Dorchester, Kent, Queen Annes, Somerset, Talbot, Wicomico and Worcester (App. 69a).

[5] The Agricultural Marketing Agreement Act governs the regulations by the Secretary of Diverse Agricultural Commodities. The Act refers to those who raise or produce the commodities as "producers" and those who distribute the commodities as "handlers". Since the instant petition is concerned solely with the regulation of milk, the producers will be referred to as "dairy farmers" and the handlers referred to as "milk companies".

farmers for processing and resale to customers on the Eastern Shore.

The Secretary of Agriculture has consistently maintained that petitioners are subject to the regulatory provisions of Order No. 127. Upon failure of petitioners to comply with the Order, the United States instituted suit against petitioners to enforce compliance pursuant to provisions of 608(a).[6]

On June 30, 1960, the District Court granted the Government's Motion for Summary Judgment and entered its order directing petitioners to comply, *United States v. Mills, et al.*, 185 F. Supp. 709 (D. Md.) (Gov't. App. 96).

Prior to the enforcement actions, petitioners had filed a petition with the Secretary of Agriculture pursuant to Section 608c(15)(A) asserting, *inter alia*, that Order No. 127 would cause petitioners "irreparable injury" and for this and other reasons Order No. 127 was not in accordance with law.[7]

Petitioners also asserted that they as well as the entire Eastern Shore area should be exempted from the Order, (Gov't. App. 134, 136) and that the Order should be modified accordingly.

The (15)(A) hearing "commenced as scheduled" on August 3, 1960. At the hearing, all proffered evidence "outside the record upon which the order was issued" was excluded[8] (Gov't. App. 121). On June 14, 1961, the exclusionary rulings of the Hearing Examiner were affirmed by the Judicial Officer (Gov't. App. 119-122), the relief re-

[6] *United States v. Mills, et al.*, No. 8774 (Gov't. App. 81).

[7] In re, Mills Dairy Products Company, et al, AMA Docket No. 127—1, June 14, 1961 (Gov't. App. 119).

[8] Mills App. 38-42, 66, 68, 73-81, treated more fully infra at p. 7 of this Petition.

quested by petitioners was denied and their (15)(A) petition was dismissed (Gov't. App. 147-149, 149-176).

Petitioners thereupon sought review of the Secretary's rulings in the District Court, pursuant to 7 U.S.C. 608c(15)(B).

The District Court on June 13, 1962, found Order No. 127 invalid, *Mills, et al. v. Freeman, Secretary of Agriculture*, 206 F. Supp. 239 (Gov't. App. 205). From this decision relieving petitioners from further compliance with the Order, the United States and the Secretary appealed. The Court of Appeals on March 11, 1963, reversed and remanded the proceedings to the District Court for enforcement.

Thereafter, a petition by another appellee in the consolidated appeals and a motion for stay pending certiorari by petitioners herein were denied (App. 24a).

REASONS FOR ALLOWANCE OF THE WRIT

I.

PETITIONERS WERE DENIED DUE PROCESS OF LAW BY THE HEARING OFFICER'S RULING THAT NO EVIDENCE MAY BE ADMITTED AT A HEARING HELD PURSUANT TO SECTION 608c(15)(A) OF THE AGRICULTURAL MARKETING AGREEMENT ACT OF 1937, AS AMENDED.

The Court of Appeals sustained the refusal of the Hearing Officer of the Department of Agriculture to admit any evidence offered by petitioners at the hearing conducted pursuant to Section 608c(15)(A) of the Agricultural Marketing Act of 1937, 7 U.S.C. 601 *et seq.* The Court of Appeals was of the opinion that it could "perceive no error" in the ruling of the Officer and that "[r]elief may be asked solely on the ground that the Order 'is not in accordance with law'" because "[t]o allow evidence would be to reopen, rather than to judge, the promulgation proceeding." (App. 14a).

The decision of the Court of Appeals was in error because the rulings of the Hearing Officer were (1) in violation of the Due Process clause of the Fifth Amendment; (2) contrary to the provisions of Section 608c(15)(A) of the Act, and the published procedural rules of the Secretary of Agriculture (25 F.R. 5911-5917; 7 C.F.R. Ch. IX) issued pursuant to the Act; and (3) in derogation of The Administrative Procedure Act of 1946, 5 U.S.C. 1001, *et seq.*

The proceedings under 7 U.S.C. 608c(15)(A).

At the outset of the Section (15)(A) hearing before the Hearing Officer of the Department of Agriculture, witnesses were called by counsel for petitioners for the purpose of submitting evidence by way of testimony and documents. Counsel for the Secretary of Agriculture immediately made a blanket objection to the admission of any testimony at the hearing on the ground that the evidence would be "*de novo*." The objection was sustained by the Hearing Officer (Mills App. 38). The Hearing Officer stated that: "* * * my rulings will be uniformly sustaining any objections to bring in *de novo* evidence or supplementary evidence, explanatory evidence as to what was contained in that record" (Mills App. 39). The Hearing Officer further ruled that, "it doesn't make any difference if it wasn't brought out." in the promulgation hearing (Mills App. 39): "I feel that the precedents establish the basic law and it is contrary to *de novo* evidence going into this record * * *" (Mills App. 41).

The Hearing Officer was of the opinion that he was:

> * * * pretty much in the same position a federal judge would be in a (15)(A) review. (7 U.S.C. 608c(15)(A)). He would be completely restricted to the record made down below, and no one would be permitted to introduce any additional evidence before that

> court, but that doesn't mean that you are deprived of a hearing. You will get the hearing that the law affords you and that's all (Mills App. 41).

The Hearing Officer did permit counsel for petitioners to make offers of proof but stated these were not evidence and could not be considered in the administrative proceeding. To the offers, the Hearing Officer said: "My ruling is that an offer of proof as evidence cannot be considered at a later time unless there is an appeal" (Mills App. 67). As to such offers of proof, he later said: "It is not considered evidence involved in this proceeding here" (Mills App. 67).

Counsel for petitioners objected to this ruling as:

> It seems to me, sir, you have got us completely boxed in on what we thought was going to be a "hearing" under the Act. Now, sir you have ruled at the moment that we cannot put in evidence. Is a hearing merely for us to appear before you and argue these principles, to write them on a piece of paper and give them to you as a brief? If you have got us boxed in in all directions so we can't produce evidence, then it isn't a hearing. It becomes nothing more than an argument (Mills App. 78).

To this the Hearing Officer replied: "It is the same as though you had a motion on the pleadings before a court of law. You would have a ruling on that motion but you would not be permitted to put in any evidence * * *" (Mills App. 78). The Hearing Officer reiterated that a (15)(A) hearing was comparable to a review by a Circuit Court of Appeals and accordingly, no evidence might be offered to show that the Eastern Shore should be excluded from the Order (Mills App. 81). The Hearing Officer's exclusionary ruling was affirmed by the Judicial Officer for the Secretary of Agriculture (Gov't. App. 119-122).

1. THE REFUSAL OF THE HEARING OFFICER TO ADMIT EVIDENCE WAS A DENIAL OF DUE PROCESS; THE HEARING CONFERRED BY 7 U.S.C. 608c(15)(A) INCLUDES THE RIGHT TO BE HEARD AND TO INTRODUCE EVIDENCE.

Title 7, Section 608c(15)(A) provides:

> Any handler subject to an order may file a written petition with the Secretary of Agriculture, stating that any such order or any provision of *any such order* or any obligation imposed in connection therewith is not in accordance with law and praying for a modification thereof or to be exempted therefrom. *He shall thereupon be given an opportunity for a hearing upon such petition, in accordance with regulations made by the Secretary of Agriculture*, with the approval of the President. *After such hearing*, the Secretary shall make a ruling upon the prayer of such petition which shall be final, if in accordance with law. (Emphasis added.) (App. 38a.)

7 U.S.C. 608c(15)(A)[9] expressly provides that after a handler has filed a petition he "shall thereupon be given *an opportunity for a hearing* upon such petition * * *." (Emphasis added.)

This Court has on many occasions defined the meaning of the word "hearing" as it relates to proceedings before an administrative agency. In *Baltimore & O. R. Co. v. United States*, 264 U.S. 258, 265 (1924), this Court held that, "the provision for a hearing implies both the privilege of introducing evidence and the duty of deciding in accordance with it. To refuse to consider evidence introduced, or to make an essential finding without supporting evidence, is arbitrary action." See also: *Skinner & Eddy Corp. v. United States*, 249 U.S. 557 (1919); *Phila-*

[9] Hereafter referred to as "(15)(A)" or "15(A) proceeding".

delphia Co. v. Securities and Exchange Com'n., 175 F. 2d 808 (C.A.D.C., 1948).

Again, in *Shields v. Utah Idaho Central R. Co.*, 305 U.S. 177, 182 (1938), the Court stated that "the requirement of a 'hearing' has obvious reference 'to the tradition of judicial proceedings in which evidence is received and weighed by the trier of the facts'. The 'hearing' is 'the hearing of evidence and argument.'" Citing *Morgan v. United States*, 298 U.S. 468 (1936).

In *United States v. Ruzicka*, 329 U.S. 287 (1946), this Court in considering the various aspects of a (15)(A) proceeding, said such a proceeding gave a "handler an expert forum for contest," (p. 292) and that "the questions (to be decided in such a proceeding) are not, or may not be, abstract questions of law." They are rather "questions of law arising out of, or entwined with factors" (p. 294). cf. *Stark v. Wickard*, 321 U.S. 288 (1944).

The Court of Appeals for the Second Circuit has clearly indicated that evidence is properly admitted in a (15)(A) proceeding and that detailed findings of fact and conclusions are to be made from such evidence. *New York State Guernsey Breeders' Co-Op. v. Wickard*, 141 F. 2d 805 (C.A. 2, 1944) (p. 807).

The essential elements of an administrative hearing must include the right and opportunity to present evidence, to submit rebuttal evidence, and to conduct cross examination, so that there will be a full and complete record of all relevant facts upon which a comprehensive ruling may be made in accordance with the authority of the administrative agency. *United States v. Storer Broadcasting Co.*, 351 U.S. 192 (1956); *Joint Anti-Fascist Refugee Com. v. McGrath*, 341 U.S. 123 (1951); *Morgan v. United States*, 304 U.S. 1 (1938); *Bowles v. Baer*, 142 F. 2d 787 (C.A. 7, 1944);

cf. *Miami Beach Federal Savings & Loan Ass'n v. Callander*, 256 F. 2d 410 (C.A. 5, 1958); *Green-Spring Dairy, Inc. v. Commissioner of Internal Revenue*, 208 F. 2d 471 (C.A. 4, 1953).

2. THE REFUSAL OF THE PRESIDING OFFICER AFFIRMED BY THE JUDICIAL OFFICER TO ADMIT EVIDENCE WAS CONTRARY TO THE RULES OF THE SECRETARY OF AGRICULTURE.

At the time the proceedings were commenced on Mills' Petition under (15)(A), the Department of Agriculture had published and in effect "Rules of Practice Governing Proceedings on Petitions to Modify or To Be Exempted From Marketing Orders," 25 F.R. 5911-5917, June 28, 1960; 7 C.F.R., Ch. 1X (App. 41a). Those Rules were issued under authority of 7 U.S.C. 608c, and are set forth in sections 900.50 through 900.71.

The Secretary of Agriculture was enjoined by (15)(A) to give a petitioner a hearing, "*in accordance with regulations made by* the Secretary of Agriculture." The quasi-judicial nature of a (15)(A) proceeding is set forth in the Regulations which provide for (1) "Application to dismiss a petition" (App. 44a); (2) the issuance of subpenas (App. 57a); (3) the examination of witnesses and the receipt of evidence (App. 48a); (4) the taking of depositions (App. 48a); (5) the admission and exclusion of evidence (App. 48a); (6) oral argument on facts or law (App. 48a); (7) reporting of testimony verbatim (App. 51a); (8) the testimony of witnesses be under oath or affirmation (App. 47a); (9) depositions (App. 52a); (10) exhibits in the form of statements, charts, tabulations, or similar data, "Offered in evidence" (App. 53a); (11) a provision for review by the Secretary of Agriculture "upon the basis of the record" (App. 61a); (12) the issuance of an order and finally a

rule allowing "applications for reopening hearing," to take further evidence (App. 62a).

Petitioners were not granted a "hearing", "in accordance with regulations." Accordingly, the hearing requirement by (15)(A) was violated by the Hearing Officer. That violation was condoned by the Court of Appeals when it upheld the ruling of the Hearing Officer which excluded all evidence offered by petitioners in the (15)(A) proceeding.

This Court has consistently held that an administrative agency is bound to follow its own rules and regulations promulgated pursuant to Congressional authority. *United States v. Shaughnessy*, 336 U.S. 806 (1949). Even if there could be doubt as to the meaning of the term "hearing" contained in 608c(15)(A), it should be construed in the constitutional sense and compatible with due process where such a construction is possible. No doubt that construction is at least possible here. *Wong Yang Sung v. McGrath*, 339 U.S. 33 (1950); *Philadelphia Co. v. Securities and Exch. Com'n.*, 175 F. 2d 808, 817 (C.A.D.C., 1948).

3. The Refusal of the Hearing Officer, as Affirmed by the Judicial Officer, to Afford Petitioners an Opportunity to Present Evidence at the (15)(A) Hearing Violated the Administrative Procedure Act of 1946.

The Administrative Procedure Act of 1946, 5 U.S.C. 1001 *et seq.* provides in pertinent part in Section 1004 that:

> In every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing * * * (with inapplicable exceptions).
>
> * * * * * *
>
> (b) The Agency shall afford all interested parties opportunity for (1) the submission and consideration of

> facts, arguments * * * where time, the nature of the proceeding, and the public interest permit * * * (App. 40a).

Section 1006(c) of Title 5 provides in part:

> Every party shall have the right to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts (App. 40a, 41a).

Since Congress did not define precisely the character of the hearing to be afforded by the Secretary in a (15)(A) proceeding, it is submitted that the national policy with respect to full and fair quasi-judicial proceedings by administrative agencies of the Government embodied in the Administrative Procedure Act applied. There is no doubt that the Administrative Procedure Act did not permit the Hearing Officer to refuse to accept evidence proffered on behalf of the petitioners on the ground that they were limited by the record in the promulgation hearing. *Marine Engineers Ben. Ass'n. v. National Labor Rel. Bd.*, 202 F. 2d 546 (C.A. 3, 1953); *Brotherhood of R.R. Trainmen v. Swan*, 214 F. 2d 56, 59 (C.A. 7, 1954); *Pinkett v. United States*, 105 F. Supp. 56 (D.C. Md.); *National Labor Rel. Bd. v. Houston & North Tex. M.F.L.*, 193 F. 2d 394 (C.A. 5, 1951).

II.

THE INCLUSION BY THE SECRETARY OF THE EASTERN SHORE COUNTIES IN ORDER NO. 127 IS ARBITRARY, CAPRICIOUS AND NOT IN ACCORDANCE WITH LAW.

In promulgating the Washington Milk Marketing Order which became effective on May 29, 1959, (24 F.R. 4331) the Deputy Administrator in his revised recommended decision issued on January 30, 1959 (24 F.R. 767, 769), found as an ultimate fact that the Eastern Shore Counties should be excluded from that order because

> While one substantial Washington handler (National Dairy Products) distributes milk through an independent vendor in the Eastern Shore Counties of *Dorchester, Somerset, Talbot, Wicomico, Worcester, Accomack* and Northampton, this area is basically rural in character and its inclusion in the area would bring under regulation a number of distributors doing a large portion of their business in other parts of Maryland and the State of Delaware where Washington area handlers have little or no distribution. *This distribution by the Washington handler constitutes a minor portion of his overall fluid business.* It is neither administratively feasible nor necessary to include within the marketing area all the territories in which Washington handlers do any business. Ideally, the established marketing area boundaries should encompass that area in which handlers who would be regulated do the preponderance of their business and should leave a minimum of competition with unregulated handlers outside of the area. The inclusion of any part of the Eastern Shore area would not tend to implement this position, but would place local handlers servicing this area in a disadvantageous position relative to their competition in their *normal area of distribution outside of the marketing area.* (Emphasis added) (Gov't. App. p. 213).

Until the day before the date of the recommended decision, all sales of milk by National Dairy Products to the Eastern Shore had been made from its Sealtest Washington plant and no sales to the Eastern Shore had been made by Sealtest Baltimore plant. On January 29, 1959, National Dairy Products transferred its source of supply to Clark Brothers (the Eastern Shore distributor for National Dairy) from the Sealtest Washington plant to the Sealtest Baltimore plant (Mills App. 15-17). A Sealtest witness frankly indicated that the switch from Washington to Baltimore was made because the recommended decision for the

Washington Metropolitan area excluded the Eastern Shore as a part thereof and Sealtest wanted the Eastern Shore to be regulated [in the Baltimore order] (Mills App. 18, 29).

The basic justification for the determination by the Secretary to include the Eastern Shore within the Baltimore marketing area was because Sealtest had transferred its supply of milk to Clark Brothers from Washington to Baltimore (Mills App. 14, 15, 29, Gov't. App. 11).

It is apparent that National Dairy Products by its own deliberate unilateral action was permitted to create an artificial condition for the express purpose of forcing the Secretary to include the Eastern Shore counties within the scope of the order which was directed primarily at marketing conditions in the Baltimore Marketing area. As a consequence it was National Dairy Products — not the Secretary — which determined that handlers and farmers on the Eastern Shore should be included in the Order. This seems intolerable in view of the tragic consequences to Petitioners and other Eastern Shore handlers and their producer-farmers.

The District Court found:

> In fact, the inclusion of the rural counties in the marketing area gives the Baltimore City dealers, with their large plants and facilities for disposing of Class II milk, a considerable competitive advantage over the local dairies. The Order makes it economically impossible for the county dairies to continue to pay their efficient farmers a higher price than the pool price, and thus takes away from the small county dairies the only effective weapon they had to compete with the Goliaths of the industry (Gov't. App. 215).

> Naturally the large city handlers and the Cooperative, which desired and needed a pool for the City market, wanted the Secretary to include the county dairies in the pool, because as a result of the greater Class I use by the county dairies they were bound to contribute more than they took out, and would to that extent subsidize the city handlers (Gov't. App. 232).

In his consideration of the area to be included in the Marketing Area Order, the Secretary should have disregarded National Dairy Products' fraudulent action and in that event there would have been no valid basis for the inclusion in the marketing area of the Eastern Shore. The Order purported to correct an assumed disorderly market in the Baltimore metropolitan area which stemmed from an alleged surplus of milk in that market. The Secretary was dealing with a distinctly Baltimore area problem and the basic purpose of the Order was to meet that metropolitan problem. Eastern Shore handlers did not, and could not, contribute to that surplus because Eastern Shore handlers were not permitted by a Baltimore City ordinance to sell milk in Baltimore and Eastern Shore farmer-producers, in fact, sold a miniscule amount of milk to Baltimore City handlers (Mills App. 5, 6, 7, 8, 9, 23; Gov't. App. 212, 232).

Of all the Baltimore City handlers, only two shipped to the Eastern Shore: National Dairy Products (Sealtest), after its switch, and H. E. Koontz Creamery, Inc.[9a] (Mills App. 12). All Baltimore City handlers marketed 95% of their milk in Baltimore City and "nearby counties", and this area does not include the Eastern Shore (Gov't. App.

[9a] The sales of milk on the Eastern Shore by Aristocrat Dairy were in such small volume that they could not be used as even a basis for consideration in establishing this area as a part of the marketing area (Mills App. 14; Gov't. App. 213).

213; Mills App. 17, 86-88), so it would appear that this rural area, comparatively distant from Baltimore, was included solely for the benefit of these large two dairies, one of which had deliberately created the condition of which it then complained.

As a consequence the Order, by including the Eastern Shore, compels Eastern Shore handlers and farmers to be subject to drastic price regulation and to contribute financially to the solution of the Baltimore City marketing problem in which they had no part in creating and in which they have no interest.

The findings made in promulgating the Washington milk market order apply with equal force and logic to Order No. 127. The definition of the standard that "the established marketing area boundaries should encompass that area in which handlers who would be regulated do the preponderance of their business" would necessarily exclude the Eastern Shore Counties from Order No. 127 because the Baltimore handlers do the preponderance of their business, approximately 95%, in the Baltimore Metropolitan area (Mills App. 86, 88). The finding made in the Washington order, that only "one substantial Washington handler distributed milk through an independent vendor in the Eastern Shore Counties . . ." is also true here (Mills App. 14).

In summary, there is no substantial evidence in the record to show why these Counties should have been excluded from the Washington Metropolitan marketing area (which is closer to the Eastern Shore area than Baltimore) but should be included in the Baltimore Metropolitan marketing area.

It appears that only 5% of the total sales of milk made by proponents of the order whose dairies were located in Baltimore City finds its way to the Eastern Shore (Gov't.

App. 213),[10] Yet, instead of finding that this was *de minimis*, the Secretary's decision and Order finds that this 5% constitutes a "substantial interest in the entire eight-county area" (Gov't. App. 11). This position is made anomalous a few pages later in the order where the Secretary finds that "any distributing plant which does less than 10% of its total fluid business in the marketing area should not be considered as substantially associated with the local market" (Gov't. App. 15). Under this standard, no Baltimore handler is associated with the Eastern Shore market.

In *United States v. Rock Royal Co-op.*, 306 U.S. 533 (1937) this Court held that the authority of the Secretary to establish a marketing area was limited to a homogeneous city milk shed in the same manner that Congress limited his choice of commodities to be regulated. At page 576, the Court said:

> The Secretary is not permitted freedom of choice as to the commodities which he may attempt to aid by an order. The Act, Section 8c(2) limits him to milk, fresh fruits except apples, tobacco, fresh vegetables, soybeans and naval stores. The Act authorized a marketing agreement and order to be issued for such production or marketing regions or areas as are practicable. *A city milkshed seems homogeneous. This standard of practicality is a limit on the power to issue orders. It determines when an order may be promulgated.* (Emphasis added.)

In *Rock Royal*, the Supreme Court made it clear that the marketing area of an order must be homogeneous and "this standard of practicality is a limit on the power to issue orders" and "it determines when an order may be promulgated."

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[10] Of the ten Baltimore City dealers, only three Baltimore handlers ship to the Eastern Shore: National Dairy Products (Sealtest), H. E. Koontz Creamery Company, and Aristocrat Dairy (Mills App. 12, Gov't. App. 213).

There is no evidence in the record from which a finding could be made that the Eastern Shore is homogeneous, *i.e.*, uniform with the Baltimore Metropolitan area. On the contrary, the economic and geographical facts make clear that the Eastern Shore is not a natural part of the Baltimore milkshed. (See findings of the District Court, Gov't. App. 232-233.)

The inclusion of the Eastern Shore in Order No. 127 was arbitrary and capricious since this determination is inconsistent with the position taken in the promulgation of the Washington Milk Marketing Order. The Order is not in accordance with law since the area included by Order No. 127 exceeds the standard of practicality which governs the issuing of milk marketing orders as determined by this Court. The Secretary's Order, insofar as it applies to the Petitioners, is invalid, and the Court of Appeals erred in not so holding.

The District Court found as a fact that there was no evidence in the record from which a finding could be made that the Eastern Shore is homogeneous; *i.e.*, uniform with the Baltimore Metropolitan area. The District Court further found to the contrary, that the economic and geographic facts make clear that the Shore is not a natural part of the Baltimore milk shed. (Findings of the District Court, Gov't. App. 232-233.)

The Court of Appeals, however, reversed the District Court without taking issue with any of the facts found by that Court, and in disregard of the mandate of *Rock Royal* as to practicality or homogeneity.

The Court of Appeals could not find from the record the threshold jurisdictional basis for the inclusion of the Eastern Shore in the marketing area. It could only find from the record that "[w]hile the appellee dairies (the

petitioners) may not have been effected by the market disturbance described by the Secretary, there is no reason to think that they would not be in the future and that Order 127 did not in some measure prevent the dairies from feeling the disturbance" (App. 13a, 14a).

The Act does not authorize the Secretary to issue orders on the basis of conjecture, speculation and remote possibilities.

III.

THE COURT OF APPEALS ERRED IN HOLDING THAT THE SECRETARY OF AGRICULTURE COMPLIED WITH THE REQUIREMENTS OF SECTION 608c(18) OF THE AGRICULTURAL MARKETING ACT OF 1937, AS AMENDED.

The enabling legislation for the issuance of an order with respect to milk or its products, under Section 608c(18), requires that: "* * *, whenever the Secretary *finds*, upon the basis of the evidence adduced [at the administrative hearing under 608b preliminary to the promulgation of the order] * * *, that the parity prices of such commodities are not reasonable in view of the price of feeds, the available supply of feeds, and other economic conditions * * *, he shall fix such prices as he finds will reflect such factors * * * and be in the public interest" (Emphasis added) (App. 39a).

The Order issued by the Secretary contains under the heading, "Findings upon the basis of the hearing record" general conclusionary findings parroting the language of the act.[11] The order contains no basic or ultimate findings of fact to support these general conclusions as required by 608c(18).

The Court of Appeals held the order valid because the Secretary's parroting of the Act had a "firm basis in the

[11] Sec. 1027.0 of Order No. 127, 24 F.R. 11071; Gov't. App. 51-53; App. 66a-68a.

record" (App. 8a). The Court of Appeals erred in sustaining the Secretary since it is evident that the Secretary cannot issue a valid order merely by indiscriminately placing facts and testimony in a voluminous record, which may or may not support his order, and then issuing an order using only the language of the act without indicating in any respect how the record supports the conclusion in the order.

When Congress conferred an explicit Federal right upon a handler to an administrative proceeding under (15)(A), Congress made it clear that it intended that a complaining party would have a real and substantial remedy and the right to be exempted from the order if the Order was not in accordance with law. If the Court of Appeals is correct in holding that the Secretary need not make any findings of fact to support his order, then the right to challenge the validity of the order on the basis of the promulgation record or upon further evidence is so emasculated as to become meaningless, because the reviewing court is denied the opportunity to evaluate the legality of the order upon the facts on which it is purportedly based or upon additional facts which may be brought out at the (15)(A) proceedings. This is apparent since the Court of Appeals also ruled that no evidence may be introduced at a (15)(A) proceeding. Thus, if the Court of Appeals is correct, a handler is completely without a remedy even if the order is patently arbitrary and capricious.

In *Phillips Dodge Corp. v. National Labor Rel. Bd.*, 313 U.S. 177, 197 (1941), this Court speaking through Mr. Justice Frankfurter said:

> The administrative process will best be vindicated by clarity in its exercise * * * it will avoid needless litigation and make for effective and expeditious enforce-

> ment of the Board's order to require the Board to disclose the basis of its order. We do not intend to enter the province that belongs to the Board, nor do we do so. All we ask of the Board is to give clear indication that it has exercised the discretion with which Congress has empowered it.

See *United States v. Baltimore & O. R. Co.*, 293 U.S. 454 (1935); *United States v. Chicago, M. St. P. & P. R. Co.*, 294 U.S. 499, 511 (1935); *Heitmeyer v. Federal Communications Commission*, U.S. F. 2d 91 (C.A.D.C. 1937); *American Airlines v. Civil Aeronautics Board*, 235 F. 2d 845 (C.A.D.C., 1956).

Because the Secretary's Order contains no findings to support his ultimate conclusion but merely paraphrases the Act, the Order is fatally defective.

CONCLUSION

Whether the quasi-judicial hearing authorized by Section 608c(15)(A) of the Agricultural Marketing Agreement Act of 1937, as amended, must be deemed a hearing with the attributes of due process involves an important constitutional question. The decision below to the contrary seems in conflict with prior decisions of this Court interpreting other statutes conferring a federal right to a "hearing". Furthermore, the decision of the Fourth Circuit is in conflict with the decision of the Second Circuit in *New York State Guernsey Breeders' Co-op. v. Wickard*, supra.

This petition presents important and substantial questions of Federal Law, namely (1) whether the Secretary of Agriculture violated his own regulations in denying Petitioners an opportunity to introduce evidence at a (15)(A) hearing, (2) whether such denial violated the Administrative Procedure Act, (3) whether the Secre-

tary, by including the non-contiguous Eastern Shore area of Maryland in the Baltimore Metropolitan area in Marketing Order No. 127, exceeded his authorized statutory power, and (4) whether the Secretary, before issuing such order, was required by the statute to make basic findings of fact.

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